84-155

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 198__

FRED A. SHELTON
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July, 1984

QUESTIONS PRESENTED FOR REVIEW

I. Whether the facts of the case establish that county funds were used to support kickbacks to petitioner, and was the alleged scheme sufficiently closely related to use of the mails.

II. Whether the conduct of the prosecution at trial deprived petitioner of a fair trial.

III. Whether conviction for mail fraud upon a count for which no maling was made was error, and if so, is it indicative of confusion on the part of the jury in applying the facts of the case to the elements of the law.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on June 11, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on June 11, 1984, as Slip Opinion No. 83-1805. There was no opinion rendered by the trial court.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254 for petitioner to seek this Writ of Certiorari to the United States Court of Appeals to review its opinion affirming the conviction in the tiral court of petitioner. The trial court judg-

ment of June 17, 1983, was followed by the June 23, 1983 Intent to Appeal by petitioner. The June 11, 1984 opinion of the Tenth Circuit Court of Appeals appears in the Appendix hereto.

STATUTORY PROVISIONS INVOLVED IN THE CASE

Title 18 U.S.C. § 1341, United States Code states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository mail matter, any matter or thing whatever to be sent or delivered by the post office department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139 Section 34, 63 Stat. 94.

Title 18 U.S.C. § 1951 states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits

or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Title 19 Oklahoma Statutes § 347 states:

> It shall be unlawful for the board of county commissioners to issue any certificate of indebtedness, in any form, in payment of or representing or acknowledging any account, claim or indebtedness against the county, or to make any contracts for or incur any indebtedness against the county in excess of the amount then unexpended and unencumbered of the sum appropriated for the specific item of estimated needs for such purpose theretofore made, sumitted, and approved or authorized for such purpose by a bond issue. All warrants upon the county treasurer, for a county purpose shall be issued upon the order of the board of county commissioners, drawn by the county clerk, signed by the chairman of the board, and attested by the signature of the county clerk, with the county seal attached. Each warrant shall designate the fund, department and appropriation account, and shall further show the nature of the indebtedness acknowledged by the allowance of the claim so paid. Whenever a county officer holding an elective office will not immediately succeed himself in said office, it shall be unlawful for the board of county commissioners, during the first six months of the fiscal year in which said term of office expires. to approve claims for the operation of said office totaling in excess of one-half the amount allocated for the operation of said office during said fiscal year, unless approval in writing is obtained from the county excise board and any claim in excess thereof in any warrant issued pursuant thereto shall be null and void.

STATEMENT OF THE CASE

A. *Procedural Background of the Case*

The petitioner herein, Fred A. Shelton, was indicted by a federal grand jury in the Eastern District of Oklahoma. The indictment charged 177 counts of mail fraud under Title 18 U.S.C. §§ 1341 and 1342 arising from an alleged scheme to defraud Muskogee County, Oklahoma, through use of the mails. There were three counts of extortion charged in violation of Title 18 U.S.C. § 1951 alleged to arise from the wrongful receipt of funds by petitioner in his official capacity as a county commissioner.

The trial to the jury began on May 2, 1983, and the verdict of the jury was returned on May 5, 1983. The jury found petitioner guilty of thirty-seven counts of mail fraud and three counts of extortion.

The trial court issued the judgment and sentence of five months on each count for a total of sixteen years and eight months. The conviction was affirmed by the circuit court. Petitioner then proceeded to this Court.

B. *Relevant Facts of the Case*

This case arose during the latter stages of the investigations and subsequent prosecutions of hundreds of county commissioners and accomplices in a kickback scandal that was state wide. Defendant was a county commissioner of long tenure who was one of the last indicted. The prosecution set a record for related cases in the state by citing 180 counts in the indictment. There were 177 counts alleged under Title 18 U.S.C. § 1341 (mail fraud) and three

under Title 18 U.S.C. § 1951 (extortion). The Honorable Frank H. Seay of the Eastern District Court of Oklahoma presided at the trial.

The case proceeded to trial with the government presenting most of the prosecution evidence through three suppliers of materials who testified that they paid kickbacks to petitioner upon receipt of purchase orders for the county, upon direction of the petitioner, and that warrants were subsequently issued for the goods. Another prosecution witness testified that she had helped falsify records for suppliers and had done so in relation to business that was transacted with defendant. All four of these witnesses had admitted involvement in such a scheme with others.

Defendant denied any participation in such a conspiracy or scheme on his part. He attempted to put on 78 witnesses which constituted all the remaining suppliers with which he had done business that he could identify and contact by using the records in the court clerk's office as a source. The court limited said witnesses to a total of five upon the grounds that their testimony would be approximately of the same substance as the entire group. Defendant introduced character witnesses and produced testimony in rebuttal as to some of the specific instances of alleged wrongfulness.

The jury found him guilty of thirty-seven counts of mail fraud, all arising from transactions with one supplier. They found him guilty of the three counts of extortion, but it is impossible to tell which activity the jury considered from the wrongs alleged in the entire 177 other counts to support the latter finding.

The procedure alleged in the mail fraud counts, for which he was found guilty, was set out by the single relevant supplier. He testified that upon the receipt of a purchase order from the defendant, he would contact defendant in private and pay him ten per cent of the total purchase. After delivery of the order, the payment was alleged to have upon each occasion been mailed by the county clerk to the subject supplier. He specifically testified that at no time was there anyone present to corroborate the alleged payments to defendants. The other two suppliers who testified for the government substantially duplicated this testimony in all respects except they admitted that part of the time their checks for supplies were picked up directly from the county clerk.

Petitioner testified that bids were taken from a public offering. The testimony was not controverted that the mailing by the county was the normal way for warrants to issue to anyone who did not request and obtain the warrant at the county court house.

The indictment did not allege that the amounts paid to the supplier were padded. The source of the alleged kickbacks was not alleged. The supplier did not allege any source for the funds that he claimed were paid to petitioner in the form of kickbacks.

JURISDICTION IN TRIAL COURT

Jurisdiction in the trial court of the Eastern District of Oklahoma was founded upon charges arising from Title 18 U.S.C. §§ 1341, 1342, and 1951.

REASONS FOR GRANTING THE WRIT

The trial court and the court of appeals abandoned the teachings of this Court in each of the following areas which are presented in the same order as they were in the above stated Questions for Review.

I. NEITHER THE INDICTMENT NOR THE PROOF ESTABLISH THAT COUNTY FUNDS WERE USED IN ALLEGED KICKBACKS OR THAT PADDED PAYMENTS WERE MADE TO THE SUBJECT SUPPLIER.

Petitioner was found guilty of thirty-seven counts of mail fraud. All counts arose from transactions with one supplier. These counts were numbered forty-two through seventy-eight and the relevant language of the indictment was as follows:

> During the period commencing on or about January 1, 1968, and continuing thereafter to on or about June 30, 1981, the exact dates of which are to this grand jury unknown, Fred A. Shelton, the defendant herein, while serving as county commissioner of Muskogee County, devised and intended to devise a scheme to defraud the citizens of Muskogee County out of their right to have the business of Muskogee County conducted openly, honestly, impartially, free from corruption and undue influence, and in accordance with the official oath of office by their elected county commissioner, and to use or cause the use of the United States mails in furtherance of the scheme.
>
> As a part of this scheme to defraud the citizens of Muskogee County, Fred A. Shelton, in his official capacity as a county commissioner of Muskogee County, did place orders and arrange the purchase of road and bridge building and maintenance materials and sup-

plies for Muskogee County from various vendors, and, in particular, James Joseph Skipper, d/b/a S&S Supply; Henry Peak, d/b/a Muskogee Equipment and Supply; and Joe Swank, d/b/a Port City Road Supplies. It was a further part of the scheme that the defendant did receive cash kickbacks from these sellers of road and bridge building and maintenance supplies in connection with both items delivered to and paid for by the county, and items paid for by the county but intentionally not delivered with defendant's full knowledge.

That on or about April 11, 1978, in the Eastern Judicial District of Oklahoma, Fred A. Shelton, the defendant herein, for the purpose of executing the aforesaid scheme to defraud the citizens of Muskogee County, and attempting to do so, did cause to be placed in an authorized mail depository, to be sent and delivered by the United States Mail Service from the Muskogee County Clerk's office to Port City Road Supplies, Box 2214, Muskogee, Oklahoma, an envelope containing county warrants Number 983, in the amount of $810; all in violation of Title 18, United States Code, Sections 1341 and 2.

On all mail fraud counts upon which petitioner was convicted, the goods were actually received and arose from transactions with a single supplier. The supplier, Joe Skipper, testified that he would take a purchase order from petitioner and immediately pay him cash in the amount of approximately ten percent of the order. He did not testify as to the source of the cash. Petitioner testified that public bids were taken on all supplies and equipment to be purchased.

When a purchase order was sent through the process and the goods were accepted and approved, the appropriate

county officer would issue a warrant that was alleged to have been sent in the mail to the supplier and thereby establish the use of the mails as an incident to fraud. It is obvious that if the payment was not proven to be padded, the use of the mail to pay the supplier for goods received is not illegal.

The process of bidding was set out by the petitioner at trial and can be found in the transcript at page 725:

> The price list is derived at — we send out for the bids, advertise in the paper that we're going to be accepting bids on a certain day for 180 days, and then we get the bids in, and we go through all the bids item by item, not bid by bid but item by item, and pick the lowest price. And then we type up — we, the clerk's office, types up the lowest price of item by item. Then we mail this back to the people, that's the price list that is set up and approved, we mail it back to the vendors, and that will be the price that we will pay, that's the lowest price that we got on that advertisement. Which we advertise in the paper three times.

Petitioner went on to again restate that the lowest price was always the price paid for each and every item (Tr. 725-726). This evidence is nowhere controverted.

The citizens of the county can't be defrauded by the payment of the lowest price available for the goods the county receives. It certainly can't be said that a scheme or conspiracy existed that encompassed each and every respondent to the public invitations to bid.

The government neither alleged nor attempted to prove a source for kickbacks. The jury simply did not have evidence before them upon which they could find a wrongful appropriation of county funds.

Since the purchases were for the minimum available price, the mailing constituted nothing more than payment of a rightful debt of the county. The government did not meet the burden of establishing a relationship between the alleged kickbacks and the warrant placed in the mail to pay the supplier.

The opinions of this Court in *United States* v. *Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), and its predecessors, teach that there must be a sufficient relationship between an alleged scheme and the use of the mails. The courts have had great difficulty in testing the various facts in individual cases.

There must be something about the mailing that is at least incident to accomplishment of the alleged scheme. Accepting all the government's evidence as true, there is not a basis to attach a wrong of any nature to the warrants that the county sent in the mail to the suppliers.

The three counts under Title 18 U.S.C. § 1951, by the same deficiency in supportive facts, do not meet the elements of the statute. The evidence in the instant case is uncontroverted that regardless of who the supplier of goods was, the lowest price on the public bids always controlled. There was no evidence that the transactions increased the price of goods flowing in commerce.

II. PROSECUTORIAL CONDUCT

Petitioner complained of misconduct of the prosecution during closing argument at the trial. The circuit court brushed the argument aside with the rationale that the prosecutor's remarks were defensible as a response to defense counsel's comments upon closing. (See Slip Opinion, Appendix at page 18a hereto.) Petitioner therefore offers here only the discrepancies of the prosecution that were presented in the initial closing argument that preceded any argument by the defense.

The initial argument upon closing was made by Prosecutor Griffith. The error therein is continuous.

At page 792 of the transcript of the trial, Griffith quotes the prosecution witness as interpreting the law that it is a violation of the law not to follow the regular business practice of the office of the county clerk to mail the relevant warrants. Not only is that not her testimony, such law is not extant in evidence or fact.

At page 793 Griffith states that the evidence related to defendant's reputation is not the issue but a "smoke screen." We assert that this is an erroneous report of fact and the law of evidence.

At page 794 he "testifies" that Joe Swank was the first witness to come forward in the case. He uses this extrajudicial fact as a basis to give credence to the testimony of the witness. He even states a date that the witness was supposed to have first come forward with the evidence.

Griffith then displays his opinion at page 796 that Swank confessed to get it off his chest. We submit that

of all the reasons that could be drawn even from circumstantial evidence, this is the most unrelated and erroneous as proper argument. He further stated on the same page that Swank wanted now to start his life over and that Swank told the truth about defendant. That error could be no more plain or inflammatory.

At page 798 Griffith states that a project testified to by defense witness Irving never existed. This opinion is outside evidence anywhere in the record. He uses this to supposedly show that Irving was "not telling you the truth."

At page 800 he opines that witness Peak pled guilty because he was thinking of his family, his grandchildren, and decided to stop "holding out and protecting those people he thought were his friends." He further brings up new facts to tell how and why witness Peak made all the relevant decisions to his plea. All such allegations are either opinion or collateral to the record herein.

At page 801 he concludes from his psychological insight into the defendant's character that defendant did not look at Peak because, "he knows it's the truth. He knows Henry Peak came in here and told the truth."

The circuit court opinion approved of the even more egregious conduct of the prosecution in the final reply argument as an equitable response to defendant counsel stating that the three suppliers who testified for the prosecution were admitted liars. The difference is that the three witnesses, who had all plead guilty to similar charges, had testified that they "lied." They actually admitted that they literally "lied" to the government and "lied" when they signed the required oath of honest dealing in connection with the purchases.

Defense counsel did not impugn the honesty of the three witnesses. They did it themselves in the evidence. Counsel did not give an opinion as to the veracity of the witnesses. He reported the facts in the record. Such is not a basis for the prosecution to retaliate and abuse the due process of a fair trial. Petitioner finds a court citing the Tenth Circuit in a similar case and arriving at the conclusion he seeks here. *Whiteside* v. *Bordenkircher,* 435 F. Supp. 68, 70 (W.D. Ky. 1977):

> While none of the above comments, arguments, and misstatements, individually, would probably have risen to constitutional proportions, the total effect of all of them was to deny the petitioner his Fourteenth Amendment right to a fair trial before an impartial jury.

III. PREJUDICE OF JURY

In addition to the above prosecution misconduct, petitioner complained of a judicial outburst, deficient *voir dire,* the striking of seventy-three witnesses and the listing of the total of 180 counts. Petitioner will not here present the details of those complaints.

Petitioner does maintain that the complex nature of the elements of the charges and the repetitious nature of reading the 180 charges to the jury would naturally prejudice the average lay person found on a jury. The court then denied, upon the basis of repetition, the presentation of seventy-three other suppliers who constituted the source of all other purchases during the time covered in the indictment. The 180 counts covered every transaction petitioner had made with the three government witnesses. It would have been no more repetitious to present the testimony of the rest of the suppliers.

The prejudice arising from the total of 180 counts could at least have been balanced. The related evidence of accepting the lowest bid price and rejection of kickbacks by petitioner offered by numerous witnesses would have certainly been of great probative value to petitioner.

The prejudice of the jury is strikingly revealed in the resultant treatment of the substance of the charges. Petitioner was convicted of the three extortion charges without evidence of any padding of prices to raise the price of the goods. There was controverted evidence that a kickback was paid to petitioner in relation to the goods purchased in the thirty-seven mail fraud charges of which he was found guilty. There was no evidence that the source of the kickback was the warrant sent in the mail by the county to pay for said goods.

There is objective proof that the jury did not properly consider one count. The jury found petitioner guilty on Count No. 66 of mail fraud even though no warrant was ever placed in the mail. The uncontroverted testimony in the transcript of the trial at pages 282-287 reveals that the warrant related to that transaction was voided. It was never placed in the mail. It was never cashed. It is still present in the exhibit.

Petitioner argued the issue in the trial court and again on appeal. He still stands convicted of that count. Confusion on the issue therefore seems to transcend the jury level of decision making.

The striking of such an objectively erroneous conviction is mandated. That is not the root of the issue. The root of the issue goes to the confusion of the jury by both

trial procedures and difficulty in understanding the elements of the charges.

The difficulty that lay people have serving as jurors was noticed, and the decision reached that the court should acutely scrutinize the substance of a verdict when the evidence is confusing in the case of *United States* v. *Bufalino*, 285 F.2d 408, 417 (2d Cir. 1960).

> The jury had to evaluate what 59 (Joseph Barbara, Sr. and the 58 who were identified) men did not November 14, and, in addition, had to analyze the testimony of the alleged conspirators. In addition the jury had before it sworn testimony in question-and-answer form taken before various governmental bodies including the New York State Liquor Authority, the United States Immigration and Naturalization Service, and grand juries both state and federal. We have found the analysis and the comparison of these statements most difficult; it is virtually impossible to keep them separately in mind and to weigh them without considerable study and without voluminous notes and indices.[24] Courts have long indulged in the somewhat naive supposition that jurors can properly assess such evidence and determine from it the individual guilt of each of many defendants, even when aided by a careful summary of the evidence such as Judge Kaufman gave here. (Footnote omitted).

The instant case was admittedly not that voluminous and the duplicity was in counts rather than the number of conspirators. It is nonetheless apparent that the evidence did not receive the careful consideration that is mandated for a fair trial.

It is further worthwhile to notice especially the first sentence of the twenty-fourth footnote that is cited in the above quote. *Id.* 417 n. 24:

> The jury's request for the testimony of Ormento at Vestal, when there was no evidence that he had ever been there, is a striking example of these difficulties.

Petitioner asserts that the guilty verdict on Count No. 66 is an exact parallel to the "striking example of these difficulties" found by the court there.

CONCLUSION

Accepting as true all the allegations in the indictment and the evidence of the government at trial, there is no connection shown between paying the minimum possible price for goods by the county and the charges of extortion and mail fraud under federal statutes. The procedures and presentation of the evidence prejudiced petitioner's right to a fair trail. The jury was confused and did not properly weigh the facts against the elements of the charges.

Respectfully submitted,

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(918) 683-4440
Attorney for Petitioner

July, 1984

CERTIFICATE OF SERVICE

I, Jon Tom Staton, do hereb certify that on this ..... day of July, 1984, I served true and correct copies of the above and foregoing Petition for Writ of Certiorari by depositing three (3) copies of same in the United States Mail, postage fully prepaid thereon, to each of the following:

Mr. Gary L. Richardson
United States Attorney
Federal Courthouse
Muskogee, Oklahoma 74401

Mr. Rex E. Lee
Solicitor General
Tenth and Constitution Avenue
Washington, D.C. 20530

All parties required to be served have been served.

Jon Tom Staton

APPENDIX

PUBLISH

[Filed June 11, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 83-1805
FRED A. SHELTON, Defendant-Appellant.	)	

On Appeal From the United States District Court
For the Eastern District of Oklahoma
No. 83-44-CR

Donn F. Baker (Gary L. Richardson, United States Attorney, with him on the Brief), Assistant United States Attorney, Muskogee, Oklahoma, Attorneys for Plaintiff-Appellee.

Jon Tom Staton (Mike Norman and Don Pearson with him on the Brief), Muskogee, Oklahoma, Attorneys for Defendant-Appellant.

Before SETH, Chief Judge, BARRETT, Circuit Judge, and SAFFELS*, District Judge.

BARRETT, Cricuit Judge.

*Honorable Dale E. Saffels, United States District Court for the District of Kansas, sitting by designation.

[APPENDIX]

Fred A. Shelton (Shelton) appeals his jury conviction on thirty-seven (37) counts of mail fraud under 18 U.S.C. §§ 1341 and 2 and three (3) counts of extortion under 18 U.S.C. § 1951. The charges were brought against Shelton while he served as a county commissioner of Muskogee County, Oklahoma. He was charged under §§ 1341 and 2 with a scheme to defraud the citizens of the county by mail. The § 1951 charges accused Shelton of interference with interstate commerce by extortion. All of the acts charged were alleged to have occurred between 1978 and 1981. The Government was limited by the five-year limitation period contained in 18 U.S.C. § 3282.

This is one of approximately two hundred prosecutions of Oklahoma county commissioners which resulted from extensive investigations pursued over a three-year period by the Federal Bureau of Investigation, the Internal Revenue Service, and the United States Attorneys for Oklahoma.

Shelton was charged with defrauding the citizens of Muskogee County, Oklahoma, in two ways. The 18 U.S.C. §§ 1341 and 2 charges accused Shelton, in his capacity as county commissioner, of purchasing various materials and supplies for Muskogee County in exchange for "kickbacks" of ten percent from the vendors. The 18 U.S.C. § 1951 charges accused Shelton of causing vendor invoices to be paid for materials and supplies which were never in fact delivered to Muskogee County, whereby Shelton "split" the payment proceeds fifty-fifty with the vendors. These charges "fit the mold" of similar cases previously appealed to this Court.[1]

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[1] *United States* v. *James*, 728 F.2d 464 (10th Cir. 1984); *United States* v. *Lightle*, 728 F.2d 468 (10th Cir. 1984); *United States* v. *Primrose*, 718 F.2d 1484 (10th Cir. 1983); *United States* v. *Whitte*, 718 F.2d 1494 (10th Cir. 1983); *United States* v. *Gann*, 718 F.2d 1502 (10th Cir. 1983); *United States* v. *Neal*, 718 F.2d 1505 (10th Cir. 1983); *United States* v. *Boston*, 718 F.2d 1511 (10th Cir. 1983); *United States* v. *Thurber*, 709 F.2d 632 (10th Cir. 1983); *United States* v. *Perry*, 709 F.2d 1348 (10th Cir. 1983).

Shelton, age sixty-one at time of trial, had served twenty years as a Muskogee county commissioner. He was a good family man and had a good reputation in his community of Fort Gibson, Oklahoma, and in Muskogee County. He was a four-year combat veteran of World War II, having served in Europe with the 45th Division. He was a likable person. He served as one of three commissioners for Muskogee County whose main responsibility was to oversee the maintenance of county roads and bridges. These roads consist of both gravel and asphalt surfaces, totaling approximately 430 miles, maintained by motor patrols, graders, grader blades, loaders, trucks, distributors to shoot and spread oil, pneumatic rollers, sheep foot rollers, and a variety of materials, including culvert pipe, bridge timbers and road signs. (R., Vol. II at 722-24.) Shelton's duties included negotiating for the county's purchase of various materials and supplies in the maintenance of the county's roads and bridges. In the five-year period prior to trial, Shelton was alleged to have been part of a fraudulent scheme whereby county funds were expended for purported purchases of materials, supplies, and equipment effected by (1) actual purchases in exchange for "kickbacks" of ten percent from the vendors/sellers, or (2) placement of orders for items not to be delivered, whereby the payment by the county was split "fifty-fifty" between Shelton and the vendors.

The principal witnesses for the government were three vendors involved with Shelton in the alleged scheme. Joe Swank (Swank) was the operator of Port City Road Supplies from 1977 to 1979. Prior to Shelton's trial, Swank had been similarly charged and had entered into a plea-bargain agreement with the United States Attorney. He was the first vendor to appear before the federal grand jury investigating the statewide "kickback" scandal. About a week before the Shelton trial, Swank had entered a plea of guilty to one count of conspiracy to commit mail fraud with Shelton. He testified that he had engaged in forty-one

"kickback" transactions with Shelton involving Muskogee County funds whereby, after he received payment by county warrant, he in turn secretly remitted ten percent as a cash "kickback" to Shelton. Swank also testified that on one or two occasions he engaged in "split deals" with Shelton whereby Swank submitted vouchers, approved by Shelton, to Muskogee County for merchandise not delivered. When Swank cashed the warrant, he secretly delivered half of the money in cash to Shelton.

Swank, too, had a good reputation. He was a college graduate and former basketball coach at the University of Tulsa and at Sentinary College. A resident of Muskogee, Swank had served in the United States Air Force from 1943 to 1946. After coaching, he engaged in the grocery business at Fort Gibson and then entered the road supply business in north Muskogee under the partnership name of Port City Road Supplies. Swank did "kickback" business with county commissioners in six counties. (R., Vol. I at 172.) Swank had known Shelton for approximately thirty or thirty-five years. He testified that Shelton's reputation for truth and veracity was honorable and stated that they were friends. On redirect examination, Swank stated that if he had not paid Shelton the "kickback" monies, he would not have obtained any business from the county. (*Id.* at 213.) On recross-examination, Swank testified that he had dealt similarly with at least twelve commissioners in six counties, to whom he paid "kickbacks" of ten percent. (*Id.* at 214).

James Joseph Skipper (Skipper) of Ada, Oklahoma, testified that as owner of a company located at Tupelo, Oklahoma, known as S & S Supply, he sold all types of bridge materials to Oklahoma county commissioners from 1975 until 1981, including culvert pipe, lumber, nails, grader blades and signs. (*Id.* at 230-31.) He stated that during this period, he paid "kickbacks" of ten percent on sales to about twenty county commissioners and participated in some fifty-fifty "splits" involving Muskogee, Cherokee and Pitts-

burg Counties. (*Id.* at 231-33.) Skipper specifically recalled doing business with Shelton in Muskogee County (District I). During the period in which Skipper was doing business as S & S Supply, he made a number of "kickback" payments to Shelton and also engaged with Shelton in the fifty-fifty splits. The "kick-backs" consisted of some thirty-six (36) transactions with Shelton, alleged in Counts 42 through 78 of the indictment, upon which Shelton was found guilty by the jury. Significantly, the record shows that in each instance Skipper was paid by county warrant received through the United States mail. (*Id.* at 252.) On the other hand, there was evidence that in many, if not most, instances of payment to vendors Joe Swank and Henry Peak (Peak), they or their representatives took possession of the county warrants in the office of the County Clerk and the mails were not used.

It is also significant, from an evidentiary standpoint, that Skipper's testimony was enhanced by the testimony of Dorothy June Griffin of Farris, Oklahoma, who, from 1963 until February, 1980, operated the Griffin Lumber Company. She testified that since the latter part of 1973, she had made "phony" invoices for a number of material suppliers in Oklahoma, in return for which she would receive five to ten percent of the gross amount of the invoice. (*Id.* at 379-84.) She testified about several phony invoices she had prepared at Skipper's request. On cross-examination, Mrs. Griffin testified that in either 1977 or 1978, in a motel room in Oklahoma City in the presence of her daughter-in-law, she spoke to Shelton about "kick-backs". (*Id.* at 403-04.) Skipper, on direct examination, had identified two "phony" invoices he received from Mrs. Griffin. One was dated June 16, 1977, for lumber in the amount of $844.80; Fred Shelton's signature appeared on the delivery ticket. (*Id.* at 248.) Skipper testified that he split the money from this "phoney" invoice with Shelton. (*Id.* at 249.) Prior thereto, on March 18, 1977, Skipper submitted a "phony" invoice for some culvert pipe purportedly purchased from Mrs. Griffin, representing a purchase price of

$528.00 and showing delivery to Shelton. Shelton's signature appears on the delivery ticket. Skipper testified that he split the proceeds from this "phony" invoice fifty-fifty with Shelton in cash. (*Id.* at 239-243.)

Henry Peak, owner of Muskogee Supply and Equipment Company, had sold road supplies to Muskogee County since 1966. Peak testified that from that date until 1981, he paid Shelton ten percent kickbacks on some one-hundred transactions, corresponding to Counts 77 through 177 of the indictment. (*Id.* at 329-35.) Peak also testified to some three or four "splits" (fifty-fifty transactions) he participated in with Shelton. Peak and Shelton were close friends. They attended high school together and entered the service together during World War II. Peak encouraged Shelton to run for county commissioner and supported him throughout his terms.

At the time of Shelton's trial, Swank, Skipper, and Peak had been indicted in the identical transactions charged to Shelton (and others). Each had entered guilty pleas under plea-bargain agreements with the United States Attorney which were not binding upon the district court in relation to sentencing proceedings.

Shelton testified that he had never received any "kickbacks" or taken any "splits." He presented four character witnesses who testified to his reputation for truth, honesty, and character in the community. Six witnesses appeared on behalf of Shelton to refute the government's evidence relative to mailings of county warrants in payment to vendors. We observe, however, that none of those witnesses refuted the evidence that all of vendor Skipper's payments were received by mail. Five vendors testified that they had sold materials and supplies to the county through Shelton and that they had not paid Shelton any kickbacks nor had Shelton asked them to do so. Witness Sam Irving, who had worked under Shelton for seventeen years as bridge foreman for Muskogee County District 1, testified that he

recalled placing certain creosote boards purchased from Skipper's S & S Supply about June 17, 1977, as a bridge floor, and placing some galvanized pipe acquired from Skipper about March 18, 1977, in a road drainage ditch. (R., Vol. II at 652-63.) These materials were the subject of the fifty-fifty splits which Skipper testified he effected with Shelton.

On appeal, Shelton contends that he was denied a fair trial and that his conviction should be reversed because: (1) the trial judge denied him a fair trial by belittling defense counsel before the jury, (2) the government denied him a fair trial by reason of prejudicial closing arguments, (3) he was denied a fair trial by deficiencies in voir dire, (4) he was prejudiced by the total of 180 counts, (5) he was denied the right to call seventy-three witnesses, (6) the jury did not test the elements of each count against the evidence, (7) the facts of the case did not meet the statutory elements of mail fraud as a matter of law, and (8) the combination of procedural and substantive deficiencies mandate a new trial.

The allegation set forth in (7) above is the only one, in our view, which can be construed as a challenge to the sufficiency of the evidence. It is tied to alleged failure by the government to present evidence meeting the statutory elements of mail fraud as a matter of law. In reviewing a challenge to the sufficiency of the evidence following conviction, we must view all of the evidence, both direct and circumstantial, and all reasonable inferences to be drawn therefrom, in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Massey*, 687 F.2d 1348, 1354 (10th Cir. 1982); *United States* v. *Blitstein*, 626 F.2d 774, 776 (10th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *United States* v. *Petersen*, 611 F.2d 1313, 1317 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); *United States* v. *Crocker*, 510 F.2d 1129, 1139 (10th Cir. 1975). A defendant is entitled to a fair trial but not a perfect trial. *Lutwak* v. *United States*, 344 U.S. 604

(1953); *United States* v. *Fritz*, 580 F.2d 370, 378 (10th Cir. 1978), *cert. denied*, 439 U.S. 947 (1978). If substantial evidence supports the jury verdict, it cannot be set aside. *United States* v. *Themy*, 624 F.2d 963, 965 (10th Cir. 1980). In the instant case, the jury, not this court, observed the appearance and demeanor of the witnesses, appraised their credibility, determined the weight to be given to their testimony, drew permissible inferences therefrom, resolved conflicts in the evidence and reached ultimate conclusions of fact. Those are functions exclusively reserved to the trier of fact. *United States* v. *Themy*, *supra* at 966; *United States* v. *Waldron*, 568 F.2d 185, 187 (10th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978). "It is fundamental that the appellate court does not weigh conflicting evidence or pass on the credibility of witnesses." *United States* v. *Posey*, 647 F.2d 1048, 1051 (10th Cir. 1981). *See also United States* v. *Downen*, 496 F.2d 314, 319 (10th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974).

We must reject the challenge to the sufficiency of the evidence out of hand. *See United States* v. *Primrose*, 718 F.2d 1484, 1489-91 (10th Cir. 1983); *United States* v. *Gann*, 718 F.2d 1502, 1504 (10th Cir. 1983). In the record there is ample evidence, if believed by the jury, that all of the county warrants in payment of invoices mailed to the county clerk by Skipper were mailed to Skipper from the office of the County Clerk of Muskogee County. "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud. . . ." *Kann* v. *United States*, 323 U.S. 88, 95 (1944).

I.

Shelton contends that the trial judge denied him a fair trial by belittling defense counsel in the presence of the jury.

Dorothy June Griffin was called as a government witness. She had been a vendor under the business name of

Griffin Lumber Company from 1963 until February, 1980, mainly engaged in selling materials and supplies to county commissioners. Early in the ongoing investigation, she had reluctantly disclosed her part in the illegal "kickback" and "split" schemes to IRS agents from the Criminal Division. (R., Vol. I at 382-83.) Among other acts, she informed the investigators of the previously referred to "phony" invoice she prepared for Skipper of supplies purportedly delievered to Shelton, and of her reference to "kickbacks" at a meeting with Shelton in Tulsa. Mrs. Griffin testified that she had cooperated with the federal government investigators since February 7, 1980. (*Id.* at 390.) Part of her cooperative work was to approach county commissioners and discuss their involvement in the alleged frauds, which discussions were recorded with tapes on her person, (*Id.* at 392), or by recorded telephone conversations, (*Id.* at 393). On cross-examination, counsel for Shelton handed Mrs. Griffin a document prepared by a Government agency dated March 19, 1980, which was an FBI agent's report or version of a taped conversation between Mrs. Griffin and Skipper. This report had been made available to defense counsel by the office of the United States Attorney. The statement was handed to Mrs. Griffin for her review. When defense counsel asked Mrs. Griffin whether she or Skipper had made a particular statement referred to in the report, Mrs. Griffin responded that she could not be sure unless she heard the tape because it had been a long time since she last heard it. (*Id.* at 396.) When defense counsel pressed Mrs. Griffin as to who made the remark set forth in the report ("The commissioners they have done business with in the past are all out of office"), she responded that she did not know "how it's being referred to." (*Id.* at 397.)

When defense counsel offered the statement prepared by the FBI agent into evidence, an objection was lodged on the ground that it did not represent Mrs. Griffin's statement. The court sustained the objection. Defense counsel then asked Mrs. Griffin "Well, would you agree that some-

body made the observation that the Commissioners that you did business with were no longer in office?" (*Id.* at 398.) Objection was made "as to what somebody else did, or what somebody else said" and it was sustained. Thereupon, defense counsel stated "Well, your Honor, it [the statement] could only be made by three people," followed by counsel's explanation that it had to be made by either Mrs. Griffin, Mr. Skipper or some agent with the FBI. Counsel then asked Mrs. Griffin who, out of these three, had made the statement. Objection again was lodged on the ground that the written document was not Mrs. Griffin's, but somebody else's, and that Mrs. Griffin had already answered the question. The following colloquy then occurred between the trial court and defense counsel:

> THE COURT: You see, that's the problem. There isn't any such evidence.
>
> MR. PEARSON (Defense Counsel): Well, Your Honor, we were furnished this by the Federal Government.
>
> THE COURT: But, Mr. Pearson, that doesn't make any difference whether you were furnished a considerable amount of material, as I have told you before. And I know what you want to do, you want to—you were furnished a considerable amount of material, counselor, at the order of the Court, all material of various kinds, because of your request for it. And if it's proper, then it may be admitted. Just because it was submitted to you doesn't mean it is proper evidence. *Surely you know that. You do know that, don't you?*
>
> MR. PEARSON: Your Honor, I know that—
>
> THE COURT: Let me just ask you, do you or do you not know just because it was given to you by Government counsel that that doesn't mean that it's relevant, competent evidence; you do know that, don't you?

MR. PEARSON: Your Honor, I know that if it has to do with the issues in this cause, it sure should be relevant to prove—

THE COURT: Well, I didn't ask you to make a speech. All right, objection sustained. I was trying to explain it to you, *but I'm not going to take time out to hold law school here, Mr. Pearson.*

MR. PEARSON: Sir, I didn't understand you.
THE COURT: I'm not going to take time out during this trial to conduct a law school. You just go ahead.

MR. PEARSON: Thank you, Your Honor.
(*Id.* at 400-01.)

Shelton reasons that the above exchange resulted in substantial prejudice to the credibility of all subsequent statements of defense counsel, and that the judge's statements cast defense counsel in the role of an "incompetent." He relies on *United States* v. *Spears*, 558 F.2d 1296 (7th Cir. 1977), where, he contends, a "similar" exchange between the court and defense counsel occurred and the appellate court held the trial court's castigation of defense counsel to be reversible error. The *Spears* court, while recognizing that defense counsel deserved reprimand or censure (which, the court observed, should have been made outside the presence of the jury), held that the court's comment that the jury will have "some question about believing you" deprived the defendant of a fair trial.

We hold that no reversible error occurred in the instant case. First, the trial court did not in anyway attack defense counsel's credibility. He did not imply that he could not be believed, as in *Spears*. Rather, the court was understandably upset because defense counsel, who had been provided with a copy of the document by the United States Attorney, did not recognize that the taped conversation, not the document purporting to relate in summary fashion what was said, was the best evidence. It is, of

course, the single remark by the trial court to the effect that the trial judge did not intend to take time to "hold law school here" that is the focus of defense counsel's contention. In our view, this contention is simply without merit. It is tantamount to a claim that counsel may and should be excused from comments and actions which are improper and offensive, but that any slight excess by the trial court rises to the stature of reversible error. This is nonsense.

In *Cooper* v. *United States*, 403 F.2d 71 (10th Cir. 1968), we held that there was no merit to the contention that the trial judge's remark that defense counsel's comment on an item he had introduced into evidence was "ridiculous" constituted such prejudice as to deny the accused a fair and impartial trial. We there observed:

> While indications in the presence of the jury that statements of the defense counsel are ridiculous, are not to be encouraged, such conduct does not constitute reversible error. *Peterson* v. *United States*, 268 F.2d 87, 88 (10th Cir. 1959). Indeed, that incident and others discussed above, were no more than displays and indicative of a firm control of the proceedings and fall well within the reasonable bounds within which a trial judge may act. *Inland Freight Lines* v. *United States*, 191 F.2d 313 (10th Cir. 1951).

Id. at 73.

Again, in *Lowther* v. *United States*, 455 F.2d 657 (10th Cir. 1972), *cert. denied*, 409 U.S. 857 (1972), we held that the trial court's statement that it did not ask for "contemptuous conduct" by defense counsel did not deny the defendants a fair trial. We said:

> [T]he trial court acted properly in ordering counsel not to comment on what was not then in evidence. The Court has the power to direct the trial along recognized lines of procedure in a manner reasonably

thought to bring about a just result. Non-prejudicial comments may be made by the Court from time to time.

Id. at 666.

In *Whitlock* v. *United States*, 429 F.2d 942 (10th Cir. 1970), defense counsel was threatened by the trial court with contempt. We there observed that although defense counsel was caused some disappointment and discomfort, this did not interfere with the fairness of the trial. *Id.* at 947. The same is true of the remarks of the trial judge in the instant case. A remark indicating that defense counsel's conduct is "contemptuous" is certainly more pointed and personally critical than the "holding law school" remark complained of here.

See also United States v. *Crawford*, 707 F.2d 447, 451 (10th Cir. 1983); *Unite ' States* v. *Baker*, 638 F.2d 198, 203 (10th Cir. 1980); *United States* v. *Gigax*, 605 F.2d 507, 510 (10th Cir. 1979); *Rasmussen Drilling* v. *Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1154 (10th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978); *United States* v. *Cardall*, 550 F.2d 604 (10th Cir. 1976), *cert. denied*, 434 U.S. 841 (1977); *Unite States* v. *MacKay*, 491 F.2d 616, 622 (10th Cir. 1973), *cert. denied*, 419 U.S. 1047 (1974).

Considering the context of the entire trial, and the instructions given to the jury, the trial judge's law school remark was clearly nonprejudicial in a constitutional sense. It could not have been interpreted as an indication of the trial court's belief that the defendant was guilty of the charges. The criticism directed to defense counsel was invited. The remark could not have influenced the jury in favor of the government and against Shelton.

The United States Supreme Court recently spoke on the issue of a fair trial in the case of *McDonough Power Equipment, Inc.* v. *Greenwood*, 52 U.S.L.W. 4126, 4127 (January 18, 1984) (No. 82-958):

> This court has long held that " '[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." (Citations omitted.) Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays judges and support personnel who manage the trials.
>
> We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "citidels of technicality." *Kotteakos* v. *United States*, 328 U.S. 750, 759 (1946). . . . The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial.

We hold that the trial court's remarks did not affect the essential fairness of the trial.

II.

Shelton argues that most of the closing argument of the prosecutor was based "upon nothing less than the 'deliberate, extensive, and highly prejudicial,' comments held in *Whiteside* v. *Bordenkircher*, 435 F.Supp. 68 (W.D. Ky. 1977) to be reversible error."

In his brief, Shelton points out the following:

> In closing argument the prosecutor relates that the witnesses that the government used had good reputations before their conviction. He informs the jury that it is all a state wide scandal, and "it has been a black eye on the State of Oklahoma." IX Record 827.
>
> He expounds upon more evidence that is also not in the record to give his version of how plea bargaining takes place. *Id.* 828-829. He makes a psycho analysis of the defendant that is based upon further facts that he introduces for the first time into evidence. IX Record 831.

> Fred Shelton is not afraid of what kind of punishment he is going to get. Fred Shelton, you have seen these kind of men. Fred Shelton can't look at his wife, Fred Shelton can't look at his daughter, Fred Shelton can't look at his brothers, Fred Shelton can't look at all the people in Muskogee County that love him so dearly and tell them what he has been doing. And he's going to go down fighting because he can't do that. He would say I would rather go down fighting, let them send me on, I'm going to go down fighting, because they will never hear it from Fred Shelton that I violated that trust.

The prosecutor then builds his own hypothetical conspiracy and alleges that it is specifically what the defense has suggested. IX Record 823.

> I got to thinking I might get indicted for even being in here prosecuting Mr. Fred Shelton. It's the Government—you've got to believe, if you believe their defense, you have got to believe that Roger Griffith, the FBI, Donn Baker, and the United States Attorney's office got Joe Swank, Henry Peak, Dorothy Griffin, Sharon Griffin, and Joe Skipper, and we got them up in our office and we said, "Here's the game plan. We're going after Fred Shelton. We don't like Fred Shelton and we're going to go get him.

He concludes the explanation of the conspiracy with a statement that intimates that if the defendant is to be acquitted, the judge himself would have to be found as an active participant. IX Record 830.

> I'm telling you, folks, that Henry Peak, the man is doing twelve years. And you know, this conspiracy deal almost has to go as far as you're going to have to throw the Judge in on the deal, because you see, Mr. Norman said that Henry is coming in here, he thinks that if he will tell

> all this stuff, that on this Rule 35 motion that the Judge in some way is going to pat him on the head and say, "That's a good boy, appreciate you coming in here and telling that stuff, I'm going to turn you out."
>
> Do you believe that? If you do, then turn him loose.

Brief of Appellant at 10-11.

No objection was lodged to the prosecutor's closing argument. Thus, this court cannot reverse unless the remarks constitute "plain error" under Fed. R. Crim. P. 52(b), 18 U.S.C.A., which this court has described as "serious prejudicial error" affecting life or liberty requiring action by the appellate court even though not called to the attention of the trial court. *United States* v. *Guerrero*, 517 F.2d 528, 531 (10th Cir. 1975); *Tapia* v. *Rodriquez*, 446 F.2d 410, 414 (10th Cir. 1971). *See also United States* v. *Splain*, 545 F.2d 1131, 1136 (8th Cir. 1976).

In all such contentions, our focus must be on the entire transcript giving rise to the challenge. This must, of necessity, be the manner by which we measure allegations of prosecutorial misconduct. On this basis, we have held certain closing remarks of prosecutors to be so prejudicial as to require a new trial. In *United States* v. *Rios*, 611 F.2d 1335, 1342 (10th Cir. 1979), *cert. denied*, 452 U.S. 918 (1981), we reversed because of the prosecutor's personal attacks on defense counsel, allegations that a defense investigator contrived testimony, expressions of personal belief in the defendant's guilt, and arguments concerning facts not in evidence. In *United States* v. *Latimar*, 511 F.2d 498, 503 (10th Cir. 1975), we held that it was reversible error for the prosecutor to advance his personal opinion concerning the defendant's guilt and to argue facts not in evidence. And in *United States* v. *Ludwig*, 508 F.2d 140, 143 (10th Cir. 1974), we reversed because the prosecutor persisted in personally vouching for the credibility of prosecution witnesses.

In the case at bar, defense counsel's closing argument referred to Henry Peak as a liar, implying that Peak had cooperated with the government in order to reduce the length of his sentence. (R., Vol. II at 802-03.) Defense counsel vouched for his own reputation when he contended that his mother and father "brought me up not to call somebody a liar" and thereupon referred to Joe Swank as "[a]n admitted liar, a convicted felon." (*Id.* at 804.) In regard to Skipper, defense counsel referred to him as "[a]n admitted liar, a convicted felon." (*Id.* at 805.) Defense counsel remarked that he did not know why Peak, Swank and Skipper were cooperating with the government but "[t]hey are all three admitted felons, pled guilty or convicted, and have told hundreds of thousands of lies." (*Id.* at 806.) The only fair interpretation to be given defense counsel's remarks concerning the testimony of Peak, Swank, and Skipper was that they had appeared as witnesses against Shelton and had lied about Shelton's participation in "kickbacks" and "splits" because of pressure and duress from the government. This alleged pressure included reference to a government payoff: "[A]bout the suppliers (Peak, Swank and Skipper). What do they hope to gain? Plead to one count, get seven counts reduced. I don't know what they're going to make when they are going to get out. You can't say either. But would you suppose they could make 3,000 a year? Would you suppose they could make 10,000 a year? *Well, ever what they could make, that's just a reward the Government has placed on them to testify to falsehoods.*" (*Id.* at 820.) (Emphasis supplied.) On another occasion, defense counsel inquired why the government did not give the suppliers who agreed to testify polygraph tests, implying that the government had only cooperated with known liars. Defense counsel referred to the tremendous power, wealth, and manpower of the Federal Government when it determines to prosecute a person. Counsel argued that "If the United States Government wanted to indict Jesus Christ, they could take the devil himself before a grand jury and get an indictment." (*Id.* at 821).

We hold that the prosecutor's comments did not constitute plain error. These remarks were in direct response to remarks of defense counsel which specifically impugned the integrity and honesty of the Federal officers and agencies to the extent of suggesting that the suppliers had knowingly lied in their testimony against Shelton in return for leniency and future monetary gain. Under these circumstances, the prosecutor's responses could not be said to deprive Shelton of a fair trial. *See United States* v. *Praetorius*, 622 F.2d 1054, 1061 (2d Cir. 1979), *cert. denied*, 449 U.S. 860 (1980). They did not constitute the "emphatic and personalized vouching" for the integrity of witnesses as found in *United States* v. *Ludwig*, *supra* at 143 (10th Cir. 1974), and they did not contain any "contrived" statement of facts condemned in *United States* v. *Rios*, *supra* at 1343-44. The government responses simply did not deprive Shelton of a fair trial. *See United States* v. *Brewer*, 630 F.2d 795 (10th Cir. 1980); *United States* v. *Bishop*, 534 F.2d 214 (10th Cir. 1976); *Sanchez* v. *Heggie*, 531 F.2d 964 (10th Cir. 1976), *cert. denied*, 429 U.S. 849 (1976).

This case was tried and argued vigorously. The unfair innuendos were cast into the mix by defense counsel. Under such circumstances, the failure of the prosecutor to respond could very well lead the jurors to conclude that the government had *in fact* contrived to obtain false testimony against Shelton. A prosecutor is certainly not relegated to the position where he is "confined to such detached exposition as would be appropriate in a lecture." *United States* v. *Bishop*, *supra*, at 220 (quoting *United States* v. *Isaacs*, 493 F.2d 1124, 1164 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974)).

The prosecutor's remarks were fairly anchored to the facts. They did not divert the jury from its sworn duty to decide the issue of innocence or guilt based on the evidence and the instructions of the court. The remarks could not have reasonably affected the jury verdict. *See United States* v. *Segal*, 649 F.2d 599, 604 (8th Cir. 1981).

III.

Shelton contends that he was denied a fair trial by deficiencies in the voir dire. There are four specific allegations of trial court abuse of discretion. We shall summarize and discuss each.

One instance of alleged prejudicial voir dire involved a juror who advised the court that she had read some stories in the Muskogee paper about the Shelton case but that it involved "[n]othing more than it was coming up and the general idea." (R., Vol. I at 45-46.) The court then asked as to whether it had affected her ability to be fair and impartial, and stated that the important thing is that one's mind had not been made up or an opinion formed. The court had previously made it clear that if any juror believed that a response was necessary to indicate a possible bias, the juror was to indicate so by raising a hand or speaking out. (*Id.* at 34-35.). Shelton contends that this inquiry was insufficient and that the court "never followed through to even inquire if the questioning venireman was prejudiced." (Brief of Appellant, p. 14). There is no merit in this contention. We have said that "simply because a prospective juror admits having read newspaper accounts relative to a criminal charge is not in itself sufficient ground for excusing a juror." *United States* v. *Lamb*, 575 F.2d 1310, 1315 (10th Cir. 1978), *cert. denied*, 439 U.S. 854 (1978).

Another contention of prejudice arising from voir dire involved a juror who acknowledged a casual acquaintance with an Assistant United States Attorney. The court carefully inquired whether the relationship was such that the juror could not serve in a fair and impartial manner, to which the juror responded, "No sir." (R., Vol. I at 50.) The court did not leave the matter there; instead, the trial judge explained the matter further and obtained the same response from the juror. (*Id.*) Significantly, at this point the trial judge informed counsel that if there "[i]s any matter you wish to bring to the Court's attention concern-

ing challenge for cause or any other relevant matters, you bring that to my attention and ask to approach the bench or I will presume that you have waived it." (*Id.* at 51.). Prior thereto, the court requested that counsel approach the bench to determine whether "[t]here are more questions they want me to ask. If you gentlemen will come up now, one lawyer for each side." (*Id.* at 42.) Following this remark, a conference was held and both sides were given every opportunity to suggest additional questions going to cause. Neither side advanced any challenges for cause. (*Id.* at 44.) Nevertheless, on appeal Shelton criticizes the trial court for "not following through," for making only "limited inquiry" and "never directly asked [asking] if they had impartiality regardless of the source." Brief of Appellant at 14. In summary, Shelton contends that "the totality of the above factors produced certain reversible error, especially when considered in the context of the rest of the case." *Id.* at 16.

We have carefully reviewed the record and have studied each area of contended trial court error relating to voir dire. We hold that there is no merit in Shelton's contention of error. The trial court was meticulous, cautious, and fair. The court did not abuse its discretion by dismissing one prospective juror for cause who was acquainted with Shelton, but not dismissing a juror who was acquainted with an FBI agent involved in the case. No bias has been established. The court solicited the aid and suggestions of counsel with respect to voir dire. Neither side believed or voiced concern with regard to lack of adequate voir dire at trial. The right to a fair and impartial jury applies to the government in the same manner as it does a defendant. *Hayes* v. *Missouri*, 120 U.S. 68 (1887).

In *McDonough Power Equipment, Inc.* v. *Greenwood, supra*, the Supreme Court made it clear that challenges to voir dire must rise to prejudicial error affecting a fair trial, and that counsel for the respective parties have an obligation to attempt to obtain information from jurors. In the

case at bar, counsel were provided full opportunity to recommend specific voir dire questions. The trial court solicited counsel's recommendations. The record reflects a full, fair and adequate voir dire.

In *United States* v. *Baker*, 638 F.2d 198, 200-01 (10th Cir. 1980), we observed:

> The principles governing the sufficiency of *voir dire* questions derive from the Sixth Amendment guarantee of an impartial jury in criminal prosecutions. The function of *voir dire* is to lay the predicate for both the judge's and counsel's judgment about the qualifications and impartiality of potential jurors. Without an adequate foundation, counsel cannot exercise sensitive and intelligent peremptory challenges, that suitable and necessary means of ensuring that juries be in fact and in the opinion of the parties fair and impartial. *See Swain* v. *Alabama*, 380 U.S. 202 (1965); *Lewis* v. *United States*, 146 U.S. 370 (1892). When the trial court undertakes the examination of potential jurors, it has a duty to consider the perspective of informed counsel, as well as its own, in determining what questions will tend to reveal possible juror prejudice.
>
> Our review of the trial court's effort in this regard is informed by the principle that *voir dire* is within the sound discretion of the trial court and that the court's discretion will not be disturbed unless there is a clear showing of abuse.

See also Ristaino v. *Ross*, 424 U.S. 589 (1976); *United States* v. *Ainesworth*, 716 F.2d 769 (10th Cir. 1983); *Lowther* v. *United States*, 455 F.2d 657 (10th Cir. 1972), *cert. denied*, 409 U.S. 857 (1972).

We hold that the trial court properly exercised its discretion in conducting voir dire. It was clearly adequate to test the qualifications and competency of the jurors. We observe that similar challenges to the trial court's conduct of voir dire were rejected by this court in *United States* v.

James, 728 F.2d 465 (10th Cir. 1984); *United States* v. *Primrose*, *supra*, and *United States* v. *Boston*, 718 F.2d 1511 (10th Cir. 1983).

IV.

Shelton contends that he was denied a fair trial because the charge of 180 total counts was in *itself* prejudicial. One-hundred seventy-eight counts charged Shelton with mail fraud pursuant to 18 U.S.C. § 1341, which defines the crime of mail fraud substantially as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or by obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . for the purposes of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [punished].

As previously observed, *all* of the warrants in payment to Skipper involving the ten-percent "kickback" to Shelton were mailed from the Muskogee County Clerk's office, following approval of the vouchers for payment by Shelton. Mail Fraud, we have observed, is established by proof that the defendant (Shelton) schemed to obtain money by false representations, and that the mails were used in furtherance of the scheme. *United States* v. *Themy*, *supra*; *United States* v. *Seasholtz*, 435 F.2d 4 (10th Cir. 1970).

Shelton's main contention is that being charged with 180 counts made adequate defense "nearly impossible." Brief of Appellant at 18. This contention is followed by the complaint that when the trial court reduced from sev-

enty-eight to five the number of suppliers Shelton wished to call as witnesses (on the apparent basis they had not been involved in any "kickback" transactions with Shelton), the reading of the 180 counts alone became prejudicial. We hold that there is no merit in these contentions. First, it is fundamental that charges may be joined in one indictment where they arise from the same or continuing act or transaction and are of the same or similar character, thus coming together to constitute parts of a common scheme. Rule 8(a), Fed. R. Crim. P., 18 U.S.C.A.; *United States* v. *Petersen, supra.* Although Shelton acknowledges that there is no identifiable prejudice in the *joinder* of the 180 counts, still he contends that "the total of 180 counts being decided in a short time by the jury resulted in objectively provable confusion." Brief of Appellant at 18.

There is nothing in this record evidencing "objectively provable confusion" on the part of the jury. There has been no prejudice demonstrated. The joinder did, on the other hand, serve the public interest in avoiding unnecessary duplication, expense and assuring a fair and speedy trial. In *United States* v. *Redetsky,* 535 F.2d 556 (10th Cir. 1976), *cert. denied,* 429 U.S. 820 (1976), the defendant was indicted on forty-one substantive counts of submitting allegedly false medicare claims. There, a bill of particulars was provided. In the case at bar, no bill of particulars was ordered, the trial court having found that each count in the indictment set forth the essential elements of the offenses charged and apprised Shelton of the nature of the crime so that he was able to prepare a defense, avoid surprise and plead former jeopardy. (R., Vol. I at 50-51). We agree. *See United States* v. *Herbst,* 565 F.2d 638 (10th Cir. 1977); *United States* v. *Moore,* 556 F.2d 479 (10th Cir. 1977); *United States* v. *Tokoph,* 514 F.2d 597 (10th Cir. 1975).

V.

We have considered the remaining allegations of error advanced by Shelton and hold that they are individually and collectively without merit. Shelton contends that the trial court erred in reducing the number of vendor witnesses he wished to call as defense witnesses from seventy-eight to five. Each witness would have testified that they did not give Shelton any kickback and that Shelton did not request any. Shelton reasons that because he was confronted with 177 counts of mail fraud, he was entitled to call the seventy-eight vendors. However, that decision is within the discretion of the trial court. Because the five vendors did testify, the testimony of the other vendors would have been repetitious and cumulative. *See* Fed. Rules Evid., Rule 403, 28 U.S.C.A. Hence, we hold that the trial court did not abuse its discretion. Shelton contends further that the jury did not consider each count and its elements separately, and that the jury was confused by the number of counts and the evidence. This contention is entirely speculative, and, in any event, the jury verdict is supported by substantial evidence.

Shelton argues next that the evidence did not meet the statutory elements of mail fraud as a matter of law, i.e., that the alleged scheme must, under the dictates of *United States* v. *Maze*, 414 U.S. 395 (1974) contemplate the use of the mails as an essential element. In light of the evidence that many of the warrants were not mailed by the Muskogee County Clerk (many were delivered to vendors and/or their representatives personally at the county clerk's office), Shelton urges that the choice was that of the county clerk and not that of the actors in the scheme. We rejected this argument in *United States* v. *Primrose, supra,* and *United States* v. *Gann, supra.* We held that the county's mailing of warrants to vendors was sufficiently related to the scheme by which the county commissioner received kickbacks from vendors to sustain mail fraud convictions—the mailings of invoices and warrants ensured that the

vendors received payment which, in turn, was the event triggering the payment of the "kickbacks."

Finally, Shelton argues that the combination of trial court errors effectively denied him a fair trial. We disagree. In our view, Shelton received a fair and impartial trial.

WE AFFIRM.